06-1271

Supreme Court, U.S.
FILED
JUL 19 2006
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

STATE OF NORTH DAKOTA
EX REL. WAYNE STENEHJEM,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is North Dakota Century Code § 51-28-02, which restricts the making of prerecorded telephone calls to residents of that State, preempted by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), and the implementing rule adopted by the Federal Communications Commission, 47 C.F.R. § 64.1200(a)(2)(ii) (2005), as applied to prerecorded interstate telephone calls that seek to survey the recipient's political views?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner, FreeEats.com, is a privately-held company doing business as ccAdvertising. No publicly held company holds 10% or more of the stock of FreeEats.com.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota was issued on April 21, 2006 and is reported at 712 N.W.2d 828 (2006). (App., *infra*, 1a). The decision of the District Court for Burleigh County is not reported. (App., *infra*, 27 a).

JURISDICTION

The Supreme Court of North Dakota entered its judgment on April 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and relevant provisions of the Communications Act of 1934 and the North Dakota Century Code are set forth in the Petition Appendix.

STATEMENT

This case concerns whether a North Dakota statute that makes it illegal to make prerecorded interstate telephone calls to residents of that state for political polling purposes is preempted by a rule issued by the Federal Communications Commission under the Telephone Consumer Protection Act of 1991 (the "TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227), that permits such calls.

Telephones are an important instrument in political campaigns. Petitioner FreeEats.com is a survey and database company that relies upon interactive-voice-response and speech-recognition technology on outbound calls using prerecorded messages to query households through survey polls, identify supporters, and later encourage those supporters to turn out to vote. The company has used this technology in many political campaigns and initiatives, including campaigns in the State of North Dakota in the 2004 elections.

1. The Telephone Consumer Protection Act

Section 2(a) of the Communications Act of 1934 authorizes the FCC to regulate interstate telephone calls. It provides, in pertinent part:

> The provisions of this chapter shall apply to all *interstate* and foreign communications by wire or radio . . . .

47 U.S.C. § 152(a) (emphasis added). Section 2(b) of the Act further provides:

> *Except as provided in sections 223 through 227* of this title, inclusive, . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier . . . .

47 U.S.C. § 152(b) (emphasis added). These two provisions have long established the basic structure of telephone regulation in the United States. The FCC generally has exclusive jurisdiction to regulate interstate calls, while the States generally have authority to regulate intrastate calls. *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988).

In 1991, Congress adopted the TCPA, which amended the Communications Act to make it unlawful to place certain types of telemarketing calls, whether interstate or intrastate in nature, and authorized the FCC to grant exemptions from these restrictions under certain circumstances.

The TCPA did not amend Section 152(a), governing FCC regulation of interstate calls, but did amend Section 152(b), concerning State jurisdiction over intrastate communications, through the introductory phrase "Except as provided in sections 223 through 227 of this title." *See* Pub. L. No. 102-243, § 3(b), 105 Stat. 2401.

In adopting the TCPA, Congress made two findings that are relevant to this case. Section 2(7) of the TCPA, 105 Stat. 2394, provides:

> Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal

> law is needed to control residential telemarketing practices.

Further, Section 2(13), 105 Stat. 2395, provides:

> While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for these types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

To provide the federal law "needed to control residential telemarketing practices," Congress enacted Section 227(b) of the Communications Act, which provides:

> It shall be unlawful for any person within the United States — . . .
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).

47 U.S.C. § 227(b)(1)(B). The phrase "any telephone call" establishes federal jurisdiction over defined categories of both intrastate and interstate telemarketing calls.

To implement the finding in Section 2(13), Congress adopted Section 227(b)(2)(B), 47 U.S.C. § 227(b)(2)(B), which provides, in pertinent part:

> In implementing the requirements of this subsection, the Commission – . . .

> (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –
>
> > (i) calls that are not made for a commercial purpose . . . .

The TCPA also contained a saving clause, 47 U.S.C. § 227(e)(1), incorporated into Section 152(b). It provides:

> (1) State law not preempted
>
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – . . .
>
> > (C) the use of artificial or prerecorded voice messages; . . . .

The issue in this case is whether this provision authorizes the States to restrict interstate telemarketing calls that the FCC permits.

2. FCC Implementation of Section 227(b)(2)(B).

In 1992, the FCC exercised the authority granted by Congress in Section 227(b)(2)(B) and adopted a rule that exempted all prerecorded calls made for a noncommercial purpose from the prohibition that otherwise would apply.[1] 47 C.F.R. § 64.1200(a)(2)(ii) (2005) provides:

> (a) No person or entity may: . . .

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd 8752 (1992) ("*1992 Report and Order*").

> (2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call: . . .
>
> (ii) Is not made for a commercial purpose . . . .

In creating this exemption, the FCC stated:

> We find that the exemption, for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, *political polling* or similar activities which do not involve solicitation as defined by our rules.

1992 Report and Order ¶ 41 (emphasis added).

Since 1992, many States have adopted laws that restrict telemarketing calls to their residents, including calls with prerecorded messages. Many of these statutes apply to both interstate and intrastate calls, without distinction.

In July 2003, the FCC issued a rule to establish a nationwide Do Not Call Registry for telemarketing calls and to make a number of other changes to its telemarketing regulations.[2] In that rulemaking, the FCC expressly reaffirmed the exemption for prerecorded, noncommercial calls. It also considered the proliferation of State laws that purported to regulate interstate telemarketing calls.

The FCC concluded that in enacting the TCPA, "it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations." *2003 Report and Order* ¶ 83. It found that the TCPA preserved for the States authority to impose more restrictive

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[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 (2003) ("*2003 Report and Order*").

requirements on *intrastate* telemarketing calls. *Id.* ¶ 82. The Commission further concluded, based on the rulemaking record, "inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs and potential consumer confusion." *Id.* ¶ 83.

> [A]ny state regulation of interstate telemarketing that differs from our rules *almost certainly* would conflict with and frustrate the federal scheme and *almost certainly* would be preempted.

Id. ¶ 84 (emphasis added).

3. The State Enforcement Action Against FreeEats.com

In 2003, North Dakota enacted a law that, with exceptions not relevant here, restricts prerecorded calls to its residents. N.D. Cent. Code § 51-28-02 provides, in pertinent part:

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. . . .

This law applies to both interstate and intrastate calls and does not differentiate between commercial and noncommercial calls, if they are prerecorded. Each call placed in violation of the statute is a separate violation, subject to a civil money penalty of $2,000. *Id.* §§ 51-28-17 & -19.

In August 2004, FreeEats.com placed numerous prerecorded telephone calls from its call center in Ashburn, Virginia to residences in North Dakota. The calls sought to determine the recipient's views on issues that were relevant to the 2004 elections. (App. 4a-5a).

On September 17, 2004, the Attorney General of North Dakota brought this enforcement action against FreeEats.com, seeking civil money penalties for violation of Section 51-28-02 by these prerecorded calls. (App. 5a).[3] The company potentially faced many millions of dollars in penalties, due to the large number of political polling calls involved.[4]

In the trial court, FreeEats.com argued that the State statute directly conflicted with the TCPA and the FCC's implementing rule, insofar as applied to prerecorded interstate political polling calls, and thus was preempted by the Supremacy Clause. (App. 28a). The court concluded that Section 51-28-02 was not preempted and that these interstate calls to North Dakota residents were illegal. (App. 29a-33a). The court imposed a civil money penalty of $10,000, plus attorney fees and costs. (App. 5a).

On appeal, the Supreme Court of North Dakota affirmed. It held that federal law did not preempt application of Section 51-28-02 to prerecorded, interstate political polling calls, based on the saving clause of the TCPA. (App. 26a). The court rejected FreeEats.com's argument that its interpretation of the saving clause should be governed by *United States v. Locke*, 529 U.S. 89 (2000), which concluded that a State is not entitled to an "assumption" of nonpreemption when it regulates in an area with a history of significant federal presence. Rather, the court assumed that Congress did not intend to preempt the State's police power and required the company to bear

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[3] Earlier in 2004, the State invoked the statute against the campaign of General Wesley Clark for having used prerecorded messages in a presidential primary election. *See Attorney General Looks into Clark Calls, Bismarck Tribune*, Jan. 24, 2004.

[4] In filings with the FCC, FreeEats.com stated that it had attempted to call each of the 235,000 households in North Dakota with a publicly-available, listed telephone number. *In the Matter of ccAdvertising*, Petition for Expedited Declaratory Ruling, FCC, CG Docket No. 02-278, filed Sept. 13, 2004.

the "burden of proving it was the clear and manifest intent of Congress to supersede state law." (App. 16a (citing *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), and other cases)).

In interpreting the saving clause, the court focused on the word "or" preceded by a comma, which separated the phrase "more restrictive intrastate requirements or regulations" from the phrase "which prohibits." It concluded that the use of the disjunctive "or," preceded by a comma, indicates that the word "intrastate" in the first clause does not modify the second clause. (App. 10a-11a). The court therefore held that while the State might not be able to regulate prerecorded, interstate political polling calls to North Dakota residents, it had authority to prohibit such calls. (App. 11a-12a).[5]

REASONS FOR GRANTING THE PETITION

This case presents an important question of law that has not been, but should be, decided by this Court concerning the respective authorities of the federal government and the States to regulate prerecorded, interstate telephone calls.

The decision of the Supreme Court of North Dakota conflicts with this Court's decisions in *United States v. Locke*, 529 U.S. 89 (2000), and *City of New York v.* FCC, 486 U.S. 57 (1988), which establish the principles governing preemption of a State law that applies to interstate

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[5] The court also noted in passing that the TCPA preserves the ability of a state to bring actions in its courts for violation of any general civil or criminal statute." (App. 21a (quoting 47 U.S.C. § 227(f)(6))). The court did not hold that Section 227(f)(6) was an independent basis for its decision; rather, it cited this provision in finding that the TCPA did not preempt the field of telemarketing regulation. In any event, there is no basis for a claim that Section 227(f)(6) provides a *second* basis for ignoring a valid FCC rule adopted pursuant to Section 227(b).

telephone service, an area long regulated at the federal level.

As applied to the calls made by FreeEats.com, N.D. Cent. Code § 51-28-02 conflicts with the FCC's rule that permits prerecorded, noncommercial interstate calls and impairs the FCC's authority to establish uniform, nationwide standards in this networked industry. The decision of the North Dakota court also frustrates the decisions made by Congress and the FCC about the appropriate balancing of consumer privacy interests and the important First Amendment rights that attach to noncommercial speech communicated through these calls.

Since 1934, Congress generally has given the FCC regulatory authority over interstate calls and has reserved regulation of intrastate calls to the States. In the TCPA, Congress did not change this basic structure; it did not amend the provision of the Communications Act that establishes the FCC's authority over interstate calls. Congress did, however, amend Section 152(b) to extend federal jurisdiction over certain categories of intrastate telemarketing calls that previously had been fenced off from federal regulation. The FCC subsequently exercised the specific authority delegated to it by Congress to permit prerecorded interstate calls for noncommercial purposes, including calls for political polling purposes.

The North Dakota court erred in upholding the State law as applied to punish Petitioner for making prerecorded interstate calls that are permissible under federal law. In reaching this conclusion, the court ignored the structure of the Communications Act and the substantive provisions of the TCPA. It also ignored the FCC's conclusion that State statutes conflicting with its TCPA rule "almost certainly" would frustrate the federal interest and "almost certainly" would be preempted. *2003 Report and Order* ¶ 84.

Instead, the court undertook a purported "plain language" interpretation of the TCPA saving clause, divorced from its context. (App. 7a). It applied an "assumption" about the operation of conflict preemption principles that is inconsistent with *Locke* and other decisions of this Court concerning the interpretation of a saving clause in a field long subject to federal regulation. Starting from these erroneous premises, the court misinterpreted the saving clause which, properly construed, limits the extension of federal authority to regulate *intrastate* calls, an area previously "fenced off" from federal jurisdiction. The court improperly converted the saving clause into a mechanism that allows the States to invade the exclusive authority of the FCC to regulate *interstate* calls. This decision directly conflicts with the FCC rule and frustrates the federal interest.

The question of the respective authorities of the FCC and the States to regulate prerecorded, noncommercial interstate calls is an important and recurrent legal issue that warrants review by the Court at this time. Many States have adopted laws that conflict with various provisions of the FCC's TCPA regulations, including its rule that permits prerecorded interstate polling calls, and have justified their statutes based on the TCPA saving clause.

These conflicting and overlapping State laws threaten the existence of the uniform, national standards for interstate calls that Congress and the FCC believe are essential in this networked industry. In addition to frustrating the federal purposes, these laws impose substantial burdens on telemarketers in conducting interstate activities clearly authorized by the FCC's regulations. Even when acting in compliance with federal law, telemarketers may face substantial *in terrorem* threats from state regulation, such as the hundreds of millions of dollars in civil penalties to which Petitioner was exposed.

This case presents an appropriate vehicle in which to resolve this legal question. The decision below is a final judgment in an enforcement action. There are no threshold questions of standing or ripeness and no disputed questions of fact that might interfere with the Court's ability to reach the merits of the issue.

Further, the question is presented in the context of North Dakota's prohibition of prerecorded, noncommercial interstate political polling calls. The chilling effect of that decision on political speech demonstrates both the practical significance of the legal issue and the importance of the Congressionally-directed balancing of First Amendment and consumer interests that the FCC made in determining that these calls should be permitted.

The Supreme Court of North Dakota explicitly declined to follow the decision of the only federal court that has considered whether the TCPA saving clause avoids preemption of State laws that conflict with the statute as applied to interstate calls. (App. 26a (declining to follow *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. Feb. 26, 2006))). Instead, it adopted the erroneous interpretation of the saving clause devised by the Supreme Court of Utah in a case involving the regulation of prerecorded commercial interstate calls. (*Id.* (citing *Utah Div. of Consumer Prot. v. Flagship Capital*, 125 P.3d 894 (Utah 2005))). Accordingly, this important legal issue is appropriately framed for resolution by the Court at this time.

I. THE DECISION OF THE SUPREME COURT OF NORTH DAKOTA IS ERRONEOUS AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Under the Supremacy Clause, any state legislation that burdens or conflicts with a federal law is invalid. U.S. Const. art VI, cl. 2. A state law conflicts with federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *E.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). The statutorily authorized regulations of a federal agency preempt any state law that conflicts with those rules or would frustrate accomplishment of their purposes. *City of New York v. FCC*, 486 U.S. 57, 64 (FCC rule implementing statutory authority to establish technical standards for cable television signals preempts more stringent local requirements).

The North Dakota statute restricts prerecorded, noncommercial interstate telemarketing calls and squarely conflicts with the FCC's rule permitting such calls. The Supreme Court of North Dakota nonetheless held that the State statute was not preempted by the FCC regulation. That decision is erroneous. It conflicts with prior decisions of this Court that have recognized exclusive federal jurisdiction to regulate interstate calls and cases that determine the proper interpretation of a saving clause in a preemption challenge to a conflicting State law in an area, like telephone service, where the federal government exercises pervasive regulatory authority.

A. Prerecorded Interstate Political Polling Calls Are Permitted by FCC Regulation.

In adopting the TCPA, Congress acted against a background of federal preemption of State laws governing interstate calls. *See City of New York*, 486 U.S. at 66 (preemption found where Congress "acted against a background of federal pre-emption on this particular issue").

Since 1934, the FCC generally has exercised exclusive regulatory authority over interstate telephone calls, and the States generally have regulated intrastate calls. This division of authority is reflected in the jurisdictional provisions of the Communications Act. Section 152(a) provides that the FCC's authority "shall apply to all interstate and foreign communications by wire or radio . . . .." Section 152(b) further provides that "[e]xcept as provided in sections 223 through 227," the FCC shall not have "jurisdiction with respect to . . . intrastate communication service."

Section 152(b) generally has the effect of "fenc[ing] off from FCC reach or regulation" matters in connection with intrastate service. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 382-83 (1986). Congress has, from time to time, amended this provision and granted the FCC jurisdiction over intrastate activities that previously were regulated by the States.[6]

The TCPA did not amend Section 152(a) governing FCC authority over interstate calls. Rather, Congress again amended Section 152(b) in a manner that expanded federal jurisdiction and limited the previously existing State authority over intrastate calls. This revision implemented the Congressional finding in Section 2(7) that an expansion of federal authority was necessary in order to control residential telemarketing practices. 105 Stat. 2394.[7] Neither the findings nor the substantive provisions of the TCPA contain any suggestion that Congress intended to expand State authority over interstate calls.

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[6] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (local competition provisions of the Telecommunications Act of 1996 extended federal authority to intrastate matters previously regulated by the States).

[7] The legislative history of the TCPA confirms that Congress intended to give the FCC jurisdiction over some intrastate calls but contains no indications that Congress intended to give the States jurisdiction over interstate calls. *See* S. Rep. No. 102-178, at 3 (1991).

Section 227(b)(1) generally prohibits all prerecorded interstate or intrastate telemarketing calls without the consent of the recipient, unless the FCC specifically exempts a type of prerecorded call under Section 227 (b)(2). Section 227(b)(2)(B) provides in turn that the FCC "may, by rule or order, exempt from the requirements of paragraph (1)(B) . . . (i) calls that are not made for a commercial purpose . . . ." This provision implements the Congressional finding in Section 2(13) that the FCC should have the flexibility to design different rules for noncommercial calls, "consistent with the free speech protections embodied in the First Amendment of the Constitution." 105 Stat. 2395.

Section 227(b)(2) thus explicitly provides the FCC with authority to adopt rules governing the legality of prerecorded noncommercial calls. *See AT&T Corp.*, 525 U.S. at 377-78. The FCC exercised that power by adopting a rule, 47 C.F.R. § 64.1200(a)(2)(ii). It exempts all noncommercial calls from the otherwise applicable statutory prohibition on prerecorded calls. The FCC expressly found that political polling calls were exempt from the prohibition on prerecorded calls. *1992 Report and Order* ¶ 40.

In 2003, the FCC conducted a further rulemaking that addressed its authority over interstate telemarketing calls. *2003 Report and Order* ¶¶ 82-84. The FCC stated that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *Id.* ¶ 84.

In sum, the TCPA modified the allocation of regulatory responsibility over telephone calls in one direction only: by expanding federal jurisdiction. Nothing in the statutory findings or the substantive provisions of the TCPA suggests that Congress altered the jurisdictional boundary in the other direction. The TCPA did not give

the States authority to regulate any interstate telemarketing calls. In particular, it did not amend Section 152(a) in any respect.

The prerecorded interstate interactive-voice-response and speech-recognition political polling calls made by FreeEats.com to North Dakota residents fall within the exemption created by 47 C.F.R. § 64.1200(a)(2)(ii) and therefore are permitted under federal law.

B. The Saving Clause of the TCPA Does Not Authorize North Dakota To Regulate Prerecorded Noncommercial Interstate Calls.

The TCPA saving clause, Section 227(e)(1), provides, in pertinent part:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – . . .
>
> (C) the use of artificial or prerecorded voice messages . . . .

The interpretation of this provision adopted by the Supreme Court of North Dakota transformed Section 227(e)(1) into a mechanism that expands State authority to regulate interstate calls. That construction contradicts the structure of the Communications Act and conflicts with this Court's decisions governing the proper interpretation of a saving clause in an area of longstanding federal regulation.

The saving clause is inartfully drafted, and its language is ambiguous. What is clear is that the word "interstate" does not appear in Section 227(e)(1)(C). Nothing

in its text plainly grants the States jurisdiction over interstate calls. The more natural reading of this provision is that in extending federal authority, Congress accommodated the States by preserving more stringent local statutes governing intrastate calls.

The North Dakota court found that the language of Section 227(e)(1) was unambiguous (App. 10a-11a); this allowed it to avoid even mentioning, let alone addressing, the contrary FCC construction articulated in its 2003 rulemaking. *See United States v. Mead*, 533 U.S. 218, 226-27 (2001). To devise its "unambiguous" construction, the court had to introduce a grammatical error into Section 227(e)(1). Its reading, that the States may not restrict but may prohibit interstate calls, would deprive an entire phrase in the saving clause of meaning and would produce a result that is at odds with the longstanding history of telephone regulation. Indeed, under the logic of the court's own distinction between restrictions and prohibitions, the North Dakota statute still would not be saved.

In light of the ambiguity in Section 227(b)(1), its interpretation should be guided by the traditional tools used to help construe a statute, including its structure and context and its interpretation by the agency Congress charged with its implementation. The North Dakota court erred by ignoring these factors and by giving broad effect to the saving clause "where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106.

1. The Court Ignored the Structure of the Communications Act. The North Dakota court erred in interpreting Section 227(e)(1) as overturning the basic allocation of responsibility that has existed since 1934 and authorizing the States to regulate a category of interstate calls. The court ignored the critical fact that the TCPA did not amend Section 152(a), which generally provides the FCC

with exclusive regulatory jurisdiction over interstate calls, but amended only Section 152(b), to expand federal authority in an area – regulation of intrastate calls – that previously had been fenced off. This structural factor alone precludes an interpretation that the saving clause included in Section 152(b) accomplished a fundamental transformation in the regulatory scheme and authorized the States to regulate a category of interstate calls.

The text of the statute shows that Congress recognized a need for expansion of federal authority. Nothing in the findings or substantive provisions of the TCPA suggests that Congress intended to accomplish an abrupt shift in federal law by authorizing the States to regulate interstate calls.

2. The Court Applied an Improper Preemption Standard. The Supreme Court of North Dakota found that because the police powers of the State were involved, its analysis properly began with an "assumption" that Congress did not intend to abrogate a State statute implementing the police power and that the party claiming preemption bears "the burden of proving it was the clear and manifest intent of Congress to supersede state law." (App. 16a; *see id.* 15a). The court erred as a matter of law.

In *United States v. Locke*, 529 U.S. 89 (2000), the Court considered the proper interpretation of a saving clause that allegedly prevented conflict preemption of state regulations in an area – maritime commerce – long regulated by the federal government. Relying on its prior decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court concluded that "an 'assumption' of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Id.* at 108.

The FCC has long regulated interstate telephone calls. Section 1 of the Communications Act, 47 U.S.C. §

151, charges the agency with ensuring efficient, nationwide phone service. *See Louisiana Public Service*, 476 U.S. at 370. Under these circumstances:

> [T]here is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation . . . .

Locke, 529 U.S. at 108. Accordingly, the North Dakota court erred by applying the wrong preemption standard and improperly imposed a burden of proof on Petitioner.

3. The Court Erroneously Interpreted Section 227(e)(1). The Supreme Court of North Dakota found that Section 227(e)(1) contained two clauses that modify the object "any State law" – (1) "that imposes more restrictive intrastate requirements or regulations"; and (2) "which prohibits." The court focused on the comma, followed by the word "or" that separates these two clauses. It found that the comma followed by a disjunctive conjunction created two parallel and independent phrases, and thus two independent regulatory requirements. (App. 10a-11a).

The word "interstate" does not appear in Section 227(e)(1). The court supplied it by assuming that the presence of "intrastate" in the first clause, and its absence in the second parallel clause, must have meant that Congress intended to draw a distinction and to allow the States to prohibit interstate calls.

This court's interpretation is based on an obvious grammatical mistake. Section 227(e)(1) does not introduce both clauses with the word "that," as would be required to create parallel clauses. Rather, it uses two different words, "that" and "which" to introduce these provisions; literally interpreted, the clauses are not parallel.

The North Dakota court simply ignored Congress' actual choice of the word "which" and implicitly revised the text as if Congress had used the word "that" instead.

Due to the ambiguity in the language of the saving clause, it is difficult to develop a rational interpretation based on its plain language alone. The word "that" introduces a restrictive clause, and the word "which" signals a nonrestrictive clause. *The Chicago Manual of Style* § 5.42 (14th rev. ed. 1993). "Which" is "used as a relative pronoun in a clause that provides additional information about the antecedent." *Webster's II New College Dictionary* 1257 (1995).

The better view is that the antecedent of "which" is not "any State law," as the court assumed, but rather the entire phrase "any State law that imposes more restrictive intrastate requirements or regulations on the use of artificial or prerecorded messages." The clause introduced by "which" provides additional information about the kinds of measures that a State is permitted to adopt for intrastate calls – i.e., it may prohibit them as well as restrict them. The comma is necessary grammatically to separate "or which prohibits" from the phrase "requirements or regulations," in which two words already are joined by a disjunctive conjunction.

This interpretation follows the principle of giving meaning to Congress' use of the different words "that" and "which" to introduce the two clauses. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Thus, properly construed, the term "intrastate" applies to both clauses.

The North Dakota court's contrary interpretation of the saving clause produces absurd results. First, under its construction, States would have the lesser authority to impose "requirements or regulations" on intrastate calls, but would have the greater power to "prohibit" interstate calls. This outcome conflicts with the basic allocation of authority in the Communications Act, under which the

States may regulate intrastate calls but have no authority over interstate calls.

Second, even accepting the court's logic, the North Dakota statute would not qualify as a "prohibition," but rather would constitute a "requirement[] or regulation[]" that could only be imposed on intrastate calls. Section 51-28-02 does not in fact absolutely ban prerecorded calls. Rather, it restricts their use to situations in which a live operator is on the line to solicit consent. Accordingly, there are substantial reasons to believe that the court's interpretation is erroneous.

As a functional matter, the court's interpretation would have the first clause serve the true purpose of a saving clause – limiting the degree of intrusion of federal authority into a domain previously allocated to the States. However, it would make the second clause serve as an affirmative grant of power to the States, a delegation that is reflected nowhere else in the TCPA. In *Locke*, the Court cautioned against interpreting language in a saving clause in a manner that would upset a settled regulatory framework and allow the States to regulate matters long regulated by the federal government.

> We think it quite unlikely that Congress would use a means so indirect as the savings clauses . . . to upset the settled division of authority by allowing states to impose additional unique substantive regulation . . . . We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

Locke, 529 U.S. at 106.

By ignoring the other provisions of the statute and basing its construction on the presence of a comma, the Supreme Court of North Dakota ignored this Court's warning in *United States National Bank of Oregon v. In-*

dependent Insurance Agents of America, Inc., 508 U.S. 439 (1993):

> [T]he meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. . . . No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning.

508 U.S. at 454-455 (internal citation omitted).

In sum, the Supreme Court of North Dakota erred in interpreting the saving clause. In the structure of the Communications Act and the context of the TCPA, that provision limits the extent of the federal intrusion into the State sphere but does not grant the States authority to override FCC rules governing interstate calls.

The only federal court to have considered this issue held, in the context of commercial calls, that the TCPA saving clause does not authorize the States to regulate interstate communications. In *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal., Feb. 26, 2006), the court considered a conflict preemption challenge to a State law that imposed more stringent restrictions on interstate fax advertisements than federal law. Section 227 of the TCPA, as amended, permits a telemarketer to transmit unsolicited fax advertisements under certain conditions to recipients with which it has an established business relationship. A subsequently enacted California law required the sender to obtain express prior consent if either the transmitter or the recipient of the fax was in California. The State defended the law on the ground that the TCPA saving clause authorized it to prohibit interstate fax transmissions.

The court held that an interpretation of Section 227(e)(1) that would have the term "intrastate" modify the first phrase, but not modify "prohibit," would be irrational.

> If the savings clause is construed to preserve the right [of the States] to restrict both intrastate and interstate telecommunications, then the word "intrastate" places no constraint on the States' jurisdiction over telecommunications and the inclusion of the work "intrastate" would be surplusage. . . . [T]he Court believes that its duty to give each word some operative effect where possible precludes such a construction.

2006 WL 462482 at *8. The court correctly found that the word "intrastate" also modified "prohibits" and held the California law unconstitutional insofar as applied to interstate calls.

II. REVIEW OF THIS IMPORTANT LEGAL ISSUE IS WARRANTED.

The decision of the Supreme Court of North Dakota compromises the FCC's authority to regulate interstate telemarketing calls, by misinterpreting the TCPA saving clause to allow States to trump the uniform national standards that Congress intended to establish for interstate telephone calls. The Court should review this important legal issue at this time, in light of the adverse effects of the decision and the clear error in its reasoning, rather than waiting while the adverse effects of its decision ramify through the legal system and create further problems.

The North Dakota decision is being watched closely by Attorneys General and telemarketers. If the decision stands, it will create a chaotic situation in which interstate political polling and other non-commercial calls will be governed by a patchwork of overlapping and conflict-

ing State laws, undermining the goals of uniformity in regulating a networked industry and respect for political speech rights that Congress recognized in adopting the TCPA. These conflicting local consumer protection restrictions would make it difficult and expensive for political pollsters and campaigns to use interstate calls. Moreover, given the volume of calls involved, pollsters will be exposed to potentially enormous penalties if they run afoul of one of the non-uniform restrictions imposed by a single State.

Several States have adopted laws that subject prerecorded interstate telephone calls to more stringent requirements than the federal standards. For example, the Minnesota statute prohibiting prerecorded calls applies to both noncommercial and commercial calls and has been enforced against prerecorded political polling calls.[8] Arizona, Colorado, Georgia, New Mexico, North Carolina, and Texas also prohibit the use of pre-recorded messages for commercial solicitations without prior consent, even when the caller has an established business relationship with the consumer. These calls are permitted under the FCC's rules.[9]

The preemption issue has arisen in several other contexts, in which States have adopted laws that are inconsistent with or more stringent than the federal standards.

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[8] Minn. Stat. § 325E.27. In *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit upheld this statute against a preemption challenge by a candidate for Governor who sought to make *intrastate* political polling calls in support of his candidacy. The record before the Supreme Court of North Dakota demonstrated that the calls at issue in *Van Bergen* were intrastate in nature. Appellant's Reply Brief at 2-3 & Addendum.

[9] *See* Ariz. Rev. Stat. §§ 13-2919, 44-1278(B)(4) & (5); Colo. Rev. Stat. §§ 18-9-311, 6-1-302(2)(a); Ga. Code Ann. §§ 46-5-23 & 24; N.M. Stat. Ann. § 57-12-22; N.C. Gen. Stat. § 75-104; Tex. Util. Code § 55.126; *compare* 47 C.F.R. § 64.1200(a)(2)(iv) (2005) (allowing prerecorded calls to those with whom the caller has an established business relationship).

These areas include restrictions on calls for noncommercial purposes,[10] calls by non-profit entities,[11] calls to persons with whom the telemarketer has a preexisting business relationship,[12] disclosure requirements,[13] and calling hours and holiday restrictions.[14]

Inconsistent State statutes continue to proliferate despite the FCC's warning that such laws "almost certainly" would be preempted if applied to interstate calls.[15] State

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[10] *See* Minn. Stat. § 325E.27; Mont. Code §45-8-216; N.H. Rev. Stat. § 359-E:1; N.D. Cent. Code § 51-28-02.

[11] Under the FCC rule, calls made by non-profit organizations are exempt from the do-not-call rules. 47 C.F.R. §§ 64.1200(d)(7), (f)(9). Twenty-one States place additional restrictions on such calls. *See, e.g.*, Alaska Stat. § 45.50.475 (exemption applies only to calls made by members or volunteers of the non-profit, and only if made to other members, previous donors, or those who recently expressed an interest in donating).

[12] *See* Ind. Code 24-4.7-1-1 (no exemption for established business relationships); Mo. Rev. Stat. § 407.1095(3)(b); La. Rev. Stat. Ann. § 45:844.12(6)(c), Mich. Comp. Laws Ann. § 455.111(j) (period for defining the existence of an established business relationship shorter than the 18 months established by 47 C.F.R. § 64.1200(f)(3)).

[13] Thirty States have imposed additional requirements on the content and timing of disclosures to be made during telemarketing calls beyond the detailed requirements set forth in the FCC rule (47 C.F.R. § 64.1200(d)(4)). *Compare* Ky. Rev. Stat. Ann. § 367.46953, N.M. Stat. Ann. § 57-12-22; Kan. St[illegible]. Ann. § 50-670(b)(4).

[14] The FCC rule allows t[illegible]emarketing calls between 8 a.m. and 9 p.m. but imposes no restrictions on the days on which calls may be made. 47 C.F.R. § 64.1200(c)(1). Seventeen States further restrict calling hours, ban calls on weekends, or prohibit calls during holidays. *See, e.g.*, La. Rev. Stat. Ann. §§ 45:811(3), 1:55 (prohibiting telemarketing calls between 8-9 p.m., and on Sunday and federal and State holidays).

[15] *E.g.*, on June 2, 2006, Tennessee enacted a law (S.B. 3162) that authorized its own state do-not-call list nearly three years after the FCC issued its rule creating a single national list. On March 13, 2006, Mississippi enacted a successor Telephone Solicitation Act that differed from the federal standards. Miss. S.B. 2695. On March 17, 2006, Indiana enacted legislation (H.B. 1280) concerning fax advertisements that differed significantly from the federal provisions. The inconsis-

legislatures continue to consider proposed legislation that is inconsistent with the federal rules.[16] State Attorneys General also routinely enforce State statutes against interstate calls; many of these cases have been settled prior to a decision on the merits of the preemption defense because of the threat of enormous *in terrorem* fines that are potentially imposed for every call made in violation of the statutes.[17]

The question of the proper application of this Court's preemption decisions to the TCPA saving clause has been addressed in several prior decisions.

For example, in *Utah Division of Consumer Protection v. Flagship Capital*, 125 P.3d 894 (2005), the Supreme Court of Utah considered whether a State law that prohibited use of automatic telephone dialing systems was preempted by the TCPA, which regulates but does not prohibit such calls. 47 U.S.C. § 227(b)(1)(D). The Supreme Court reversed a lower court decision that had dismissed on preemption grounds a State enforcement action against a Florida telemarketer. Ignoring the long history of federal regulation, the court erroneously held that since the police power was at issue, there was a presumption that the State law was constitutional and that

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tent California statute at issue in *Chamber of Commerce* similarly was passed after adoption of the federal law.

[16] *E.g.*, on January 10, 2005, a bill was introduced in the Alaska legislature (Alaska H.B. 62) that sought to ban prerecorded calls to persons on the Alaska or federal do-not-call lists when the purpose of the call was "to communicate a message made to convince potential voters concerning the outcome of an election of a candidate or made to influence the outcome of a proposition." *See also* Iowa H.B. 36 (introduced January 11, 2005) (proposing to remove all exemptions to the prohibition on prerecorded messages, which would restrict political calls).

[17] TCPA preemption claims also have arisen in several cases involving efforts by telemarketers to remove State enforcement actions to federal court. *See, e.g.*, *North Carolina v. Debt Management Services Inc.*, No. 5:03-CV-950-FL(3) (E.D.N.C. Mar. 8, 2004); *Florida v. The Sports Authority*, No. 6:04-cv-115-Orl-JGG (M.D. Fla. June 4, 2004).

the challenger faced a burden of proving that it was unconstitutional. 125 P.3d at 900. It further found that there was no conflict between the Utah law and the federal law, because the telemarketer could comply with both standards if it simply chose not to make calls to Utah residents. *Id.* at 901. The court concluded:

> That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

Id. Its holding is plainly inconsistent with prior decisions of this Court, which establish that a State cannot avoid a preemption challenge by arguing that the regulated entity should simply refrain from performing the activity that is lawful under the federal standard. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) ("Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.").

By contrast, in *Chamber of Commerce v. Lockyer*, the Eastern District of California held that a State statute that imposed more restrictive standards on interstate fax advertisements than federal law, by requiring express prior consent of the recipient, was preempted because the more stringent provision created an obstacle to the accomplishment of the federal purposes. 2006 WL 462482 at *8.

In reaching its decision, the Supreme Court of North Dakota explicitly declined to follow the decision in *Chamber of Commerce* and chose instead to adopt the reasoning of the Supreme Court of Utah in *Flagship Capital*. (App. 26a). It thereby repeated the two legal errors made by the Utah court, in applying an improper preemption standard to an area with a long history of exclusive fed-

eral regulation, and in concluding that the State statute did not frustrate the federal purposes because Petitioner could have avoided any problem "if it had complied with North Dakota law and refrained from placing calls to North Dakota residents." (App. 22a).

Until this Court definitively decides the question, disputes will continue to arise concerning the legal authority of the States under the TCPA to impose more stringent restrictions on interstate telephone calls than were adopted by Congress and the FCC. This cause presents the preemption question in the context of a final judgment in an enforcement action. The legal issue is squarely presented, and there are no threshold procedural issues or questions of fact that would complicate the Court's ability to reach the merits.

Further, the question arises in the context of a prohibition of prerecorded, interstate political polling calls. The political speech considerations demonstrate the practical significance of the legal issue and the chilling effect of the North Dakota statute as applied to prohibit expression that is fully protected under the First Amendment.

The interests of judicial economy would be served by resolving the issue at this time, before there is further fracturing of what Congress intended to be uniform national rules governing interstate calls and before litigation on this issue proliferates further.

In its 2003 rulemaking, the FCC stated its belief that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *2003 Report and Order* ¶ 84. The agency explicitly urged the States to refrain from creating such conflicts: "We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules." *Id.* Nevertheless, as noted, the States continue to

adopt laws that are more stringent than the counterpart federal rules.

In the 2003 proceeding, the FCC also stated that it would establish a process by which "any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission" and that it would "consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis." *Id.* Many parties have sought declaratory rulings from the FCC that various State statutes regulating commercial telemarketing calls are preempted.[18] Indeed, shortly before the initiation of this enforcement action, FreeEats.com filed a petition seeking a declaratory ruling that Section 51-28-02 was preempted.[19] To date, the FCC has not acted upon any of these submissions.

The pendency of the requests before the FCC in no way argues against granting the Petition in this case. The North Dakota court has entered a final judgment against Petitioner holding that the TCPA does not preempt Section 51-28-02. Even if the FCC were to issue a declaratory ruling on the company's submission, that action would have no impact on its liability in this case and would provide scant protection for Petitioner or another telemarketer if it were to place political polling calls to North Dakota residents in the future.

Moreover, since the issue arises in the context of an enforcement action, it is both more concrete and unburdened by the peripheral administrative law issues that might accompany an appeal from a hypothetical future FCC decision.

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[18] *See, e.g.*, Joint Petition, *In the Matter of Alliance Contact Services*, FCC, CG Docket No. 02-278, filed April 29, 2005 (filed by 32 parties).

[19] *In the Matter of ccAdvertising*, Petition for Expedited Declaratory Ruling, FCC, CG Docket No. 02-278, filed Sept. 13, 2004.

The importance of the constitutional considerations that persuaded Congress to adopt a specific provision in the TCPA applicable to noncommercial prerecorded calls makes this a particularly appropriate case in which to review the recurrent issue concerning the proper interpretation of the TCPA saving clause.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 19, 2006

APPENDIX

APPENDIX

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General v. FreeEats.com, Inc. 1a

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General v. FreeEats.com, Inc., Case No. 04-C-1694 (Burleigh County Feb. 2, 2005). 27a

U.S. Const. art. VI, cl. 2 ..... 39a

Telephone Consumer Protection Act of 1991, 27 U.S.C. § 227 (excerpts). 39a

N.D. Cent. Code § 5-28-02 ..... 40a

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT
Supreme Court No. 20050171

Appeal from the district court for Burleigh County.

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General,	**Plaintiff and Appellee**
v.	
FreeEats.com, Inc., dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz ccAdvertising.Info ElectionResearch.com FECads.com and FECResearch.com	**Defendant and Appellant**

This appeal having been heard by the Court at the October 2005 Term before Chief Justice Gerald W. VandeWalle, Justice Mary Muehlen Maring, Justice Carol Ronning Kapsner, Justice Daniel J. Crothers, and Surrogate Judge William F. Hodny, sitting in place of Justice Dale V. Sandstrom, disqualified;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the district court is AFFIRMED.

IT IS FURTHER ORDERED AND ADJUDGED that State of North Dakota ex rel. Wayne Stenehjem, Attorney General, have and recover from Appellant costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court.

Dated: April 21, 2006.

By the Court:

_____

Chief Justice

ATTEST:

_____

Clerk

seal

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2006 ND 84

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General, **Plaintiff and Appellee**

v.

FreeEats.com, Inc., dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz ccAdvertising.Info ElectionResearch.com FECads.com and FECResearch.com and Appellant **Defendant**

No. 20050171

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Gail H. Hagerty, Judge.

AFFIRMED.

Opinion of the Court by Kapsner, Justice.

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State ex rel. Stenehjem v. FreeEats.com, Inc.
No. 20050171

Kapsner, Justice.

[¶1] FreeEats.com, Inc. ("FreeEats") has appealed from a summary judgment finding FreeEats in violation of North Dakota's telephone solicitation statutes and imposing civil penalties, attorney fees, costs, and disbursements. We affirm, concluding North Dakota's prohibition against placement of political polling calls using an automatic dialing-announcing device is not preempted by federal law.

I

[¶2] FreeEats is based in Herndon, Virginia, and conducts telephone surveys and polling services. In August 2004, FreeEats placed numerous political polling calls from its call center in Ashburn, Virginia, to residences in

North Dakota. FreeEats employed an automatic dialing-announcing device to place the calls, and all of the calls used prerecorded messages with no live person on the line.

[¶3] On September 17, 2004, the State brought this action against FreeEats seeking civil penalties for violations of N.D.C.C. § 51-28-02. FreeEats admitted it made the automated calls to North Dakota residents, but argued application of N.D.C.C. § 5128-02 to interstate political polling calls was preempted by federal law. On cross-motions for summary judgment, the district court concluded that application of N.D.C.C. § 51-28-02 was not preempted by federal law and that the calls placed by FreeEats to North Dakota residents violated the statute. Judgment was entered ordering FreeEats to pay $10,000 in civil penalties and $10,000 in attorney fees, costs, and disbursements. FreeEats has appealed, alleging the district court erred in concluding that federal law did not preempt application of N.D.C.C. § 51-28-02 to interstate political polling calls.

II

[¶4] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. Wheeler v. Gardner, 2006 ND 24, ¶8, 708 N.W.2d 908; Jacob v. Nodak Mut. Ins. Co., 2005 ND 56, ¶ 11, 693 N.W.2d 604. Summary judgment is appropriate if the issues in the case are such that resolution of any factual disputes will not alter the result. Jacob, at ¶11; Tibert v. Slominski, 2005 ND 34, ¶8, 692 N.W.2d 133. Whether the trial court properly granted summary judg-

ment is a question of law that we review de novo on the entire record. Wheeler, at 118; Heng v. Kotech Med. Corp., 2004 ND 204, ¶9, 688 N.W.2d 389.

[¶5] In this case there are no disputed issues of material fact, and the sole question presented involves interpretation of statutes. Interpretation and application of a statute is a question of law, which is fully reviewable on appeal. Wheeler, 2006 ND 24, ¶10, 708 N.W.2d 908; Smith v. Hall, 2005 ND 215, ¶15, 707 N.W.2d 247. Accordingly, this case was appropriate for resolution on a motion for summary judgment.

III

[¶6] The sole question presented on appeal is whether federal law preempts the application of N.D.C.C. § 5.1-28-02 to automated political polling calls made from Virginia to residents in North Dakota.

[¶7] Section 51-28-02, N.D.C.C., prohibits the placement of telephone calls using an automatic dialing-announcing device except in certain enumerated instances:

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district

> to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

The calls placed by FreeEats to North Dakota residents in 2004 did not fit under any of the exemptions in N.D.C.C. § 51-28-02.

[¶8] FreeEats contends, however, that application of N.D.C.C. § 51-28-02 to interstate calls is preempted by 47 U.S.C. § 227, the Telephone Consumer Protection Act of 1991 ("TCPA"). The TCPA prohibits calls to a residential telephone line using an artificial or prerecorded voice without the recipient's prior express consent, "unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission under paragraph (2)(B)." 47 U.S.C. § 227(b)(1)(B). Under paragraph (2)(B), the FCC is authorized to exempt calls that are not made for a commercial purpose. 47 U.S.C. § 227(b)(2)(B)(i). The FCC has adopted a regulation exempting calls not made for a commercial purpose from the TCPA's general prohibition on calls using an artificial or prerecorded voice message. 47 C.F.R. § 64.1200(a)(2)(ii) (2005). FreeEats contends the political polling calls at issue in this case were not made for a commercial purpose, and were therefore permissible under federal law.

A

[¶9] The crux of this case lies in the interpretation of the TCPA's "savings clause," 47 U.S.C. § 227(e)(1):

> (1) State law not preempted

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits-
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.

[¶10] The parties offer conflicting interpretations of the statute, centering upon the scope of the term "intrastate." The State contends the language of the statute is clear and unambiguous, and the term "intrastate" modifies only "more restrictive . . . requirements or regulations," and does not modify "which prohibits." The State argues that the TCPA therefore expressly permits application of state statutes which prohibit certain classes of calls placed with automatic dialing systems or which use artificial or prerecorded voice messages to interstate calls placed to North Dakota residents. FreeEats argues the legislative history of the TCPA indicates Congressional intent to preempt state regulation of interstate calls, and therefore urges that the term "intrastate" must be read as applying to the phrase "which prohibits." Thus, FreeEats contends, the TCPA preempts any attempt by a state to either regulate or prohibit interstate calls which employ automatic dialers or prerecorded messages.

[¶11] In interpreting the statute, we are guided by well-settled rules of federal statutory construction. When the language of a statute is plain, "the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." Dodd v. United States, 125 S.Ct. 2478, 2483 (2005) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)); Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) (quoting Hartford). The "preeminent canon of statutory interpretation" requires that courts "presume that [the] legislature says in a statute what it means and means in a statute what it says there." Bedroc Ltd. v. United States, 541 U.S. 176, 183 (2004) (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)); see Dodd, at 2482 (quoting Connecticut Nat'l Bank). The court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous," Bedroc, at 183, and courts and administrative agencies must give effect to the unambiguously expressed intent of Congress. Norfolk & Western Rv. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 128 (1991).

[¶12] The Supreme Court has concluded that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204,220 (2002) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248,261 (1993)). It is not a court's function "to find reasons for what Congress has plainly done," but rather the court's job is to "avoid rendering what Congress has plainly done . . . devoid of reason and effect." Great-West, at 217-18. It is for Congress, not the courts, to amend a statute if the plain language of the statute does not accurately reflect the true intent of Congress. See Dodd, 125 S.Ct. at 2483. As noted by the Supreme Court in Carter v. United States, 530

U.S. 255, 271 (2000) (citation omitted) (quoting Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring)), when construing a statute a court must "begin by examining the text, not by 'psychoanalyzing those who enacted it.'"

[¶13] The TCPA savings clause expressly exempts from preemption "any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits" unsolicited fax advertisements, use of automatic dialers, use of artificial or prerecorded voice messages, or making of telephone solicitations. 47 U.S.C. § 227(e)(1). The State contends that the use of the disjunctive "or," preceded by a comma, indicates the word "intrastate" in the first clause does not modify the second clause. FreeEats essentially ignores the language of the statute and bases its argument upon the contention that the legislative history demonstrates Congressional intent to preempt all state statutes affecting interstate calls.

[¶14] The word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions. Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979); Christl v. Swanson, 2000 ND 74, ¶12, 609 N.W.2d 70; Narum v. Faxx Foods, Inc., 1999 ND 45, ¶20, 590 N.W.2d 454. Terms or phrases separated by "or" have separate and independent significance. Reiter, at 338-39. Coupled with the comma preceding "or," which indicates a separate clause, the statutory language clearly creates two distinct and independent phrases. Thus, read logically and grammatically, the statute states that nothing in the TCPA preempts any state law "that imposes more restrictive intrastate requirements or regulations on" the enumerated classes of calls, and nothing in the TCPA preempts any state law "which prohibits" calls within the

enumerated list. "Intrastate" unambiguously modifies only the first clause, not the second. If Congress had intended that the second part of the statute apply only to intrastate calls, "it could simply have said that." Great-West, 534 U.S. at 218. Because the statutory text is unambiguous, our inquiry into its meaning ends there. Bedroc, 541 U.S. at 183.

[¶15] FreeEats contends that, even if the statutory language is clear, a literal interpretation of the statute would create an absurd result. See Dodd, 125 S.Ct. at 2483; Lamie, 540 U.S. at 534. Specifically, FreeEats argues it is illogical to allow states to adopt more restrictive regulations on only intrastate calls, but to allow wholesale prohibition of certain classes of both intrastate and interstate calls.

[¶16] FreeEats contends that one important policy basis for enactment of the TCPA was to alleviate the excessive burdens which might be placed upon interstate telemarketers if they were required to comply with a plethora of conflicting regulations from all fifty states. In this context, there may be a substantial difference between the effect of state laws which seek to impose voluminous regulations upon interstate calls and those which wholly prohibit a specific class of interstate calls. The TCPA and corresponding regulations govern many diverse aspects of such calls. For example, under the relevant federal regulation, telephone solicitations may only be made to a residential telephone customer between 8 a.m. and 9 p.m. local time. 47 C.F.R. § 64.1200(c)(1). It is foreseeable that, if each state adopted differing time restrictions on telemarketing calls, it may be difficult for a telemarketer to adjust its equipment to place calls to the various states only within a particular state's permissible hours. The

states could conceivably create a stream of inconsistent and conflicting regulations on innumerable aspects of telemarketing calls, thereby making compliance with each individual state's unique set of rules and regulations burdensome.

[¶17] By contrast, it would be a relatively simple matter for a telemarketer to comply with a state statute which wholly prohibits certain enumerated classes of calls. When contemplating placing a certain type of call, the telemarketer need only review state law to determine if such calls are prohibited in a particular state. If so, it is presumably an easy task for the telemarketer to refrain from placing calls to that state's residents. See Utah Div. of Consumer Prot. v. Flagship Capital, 2005 UT 76, ¶22, 125 P.3d 894 ("the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents").

[¶18] We conclude that a literal interpretation of the unambiguous language of the statute does not lead to an absurd result. See Dodd, 125 S.Ct. at 2483; Lamie, 540 U.S. at 534. We therefore interpret the express language of 47 U.S.C. § 227(e)(1) to provide that the TCPA does not preempt any state law which prohibits interstate calls using automatic telephone dialing systems or using artificial or prerecorded voice messages. We must review FreeEats' claim of federal preemption within the context of this interpretation of the TCPA.

B

[¶19] Under the Supremacy Clause, U.S. Const. art. VI, the laws of the United States are the "supreme law of the land," and state law that conflicts with federal law is without effect. Home of Economy v. Burlington N. Santa

Fe R.R., 2005 ND 74, ¶5, 694 N.W.2d 840. In Home of Economy, we quoted the United States Supreme Court's outline of the parameters of federal preemption under the Supremacy Clause:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field preemption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where ... the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "'clear and manifest.'"
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is im-

> possible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Home of Economy, at ¶5 (quoting English v. General Elec. Co., 496 U.S. 72, 78-79 (1990)). Thus, federal preemption analysis includes three components: express preemption, field preemption, and conflict preemption.

[¶20] Because of the "interstitial nature of Federal law," preemption of state law is not favored, and the framework for analyzing a preemption claim under the Supremacy Clause begins with the basic assumption that Congress did not intend to displace state law. Billey v. North Dakota Stockmen's Ass'n, 1998 ND 120, ¶28, 579 N. W.2d 171 (quoting Federal Land Bank of St. Paul v. Lilichaugen, 404 N.W.2d 452, 455 (N.D. 1987)); see also Home of Economy, 2005 ND 74, ¶6, 694 N.W.2d 840. The United States Supreme Court has expressly noted that, because "the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt" state law. Bates v. Dow Agrosciences LLC, 125 S.Ct. 1788, 1801 (2005) (quoting Medtronic. Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Although the assumption that Congress did not intend to displace state law is not ordinarily triggered when a state statute touches upon an area where there has been a history of significant federal presence, where the state acts in a field that states have traditionally occupied, the assumption that the state's historic police powers are not superseded by federal law applies unless Congress clearly and manifestly expresses a contrary intent. Home of Economy, at ¶6.

[¶21] It has long been recognized that the police power of a state extends beyond the health, morals, and safety of the community, and encompasses the duty to protect the privacy of its citizens, including the authority to protect the peaceful enjoyment of the home and the well-being and tranquility of the community. See Hynes v. Mayor and Council, 425 U.S. 610, 619 (1976); Breard v. City of Alexandria, 341 U.S. 622, 640 (1951); Thornhill v. Alabama, 310 U.S. 88, 105 (1940). This authority includes the power to enact laws regulating or prohibiting interstate telemarketing practices. See Flagship Capital, 2005 UT 76, ¶¶19-20, 125 P.3d 894. Furthermore, the United States Court of Appeals for the Eighth Circuit, in a case upholding the constitutionality of the North Dakota Telephone Solicitations Act, N.D.C.C. ch. 51-28, the statute involved here, noted that "residential privacy is a 'significant' government interest, particularly when telemarketing calls 'are flourishing, and becoming a reoccurring nuisance by virtue of their quantity.'" Fraternal Order of Police v. Stenehiem, 431 F.3d 591, 597 (8th Cir. 2005) (quoting Van Bergen v. Minnesota, 59 F.3d 1541, 1555 (8th Cir. 1995)). In concluding that a Utah statute regulating telemarketing was not preempted by the TCPA, the Supreme Court of Utah held that, "[w]here the police power is at issue, there is a presumption that the regulations can constitutionally coexist, with a resulting burden of proof placed on the party claiming preemption." Flagship Capital, at ¶20 (citing Hillsborough County v. Automated Med. Labs, Inc., 471 U.S. 707, 716 (1985)). As noted by the United States Supreme Court, when considering preemption a court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." City of Columbus v. Ours

Garage & Wrecker Serv., Inc., 536 U.S. 424, 432 (2002) (quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991)).

[¶22] We thus begin our analysis with the assumption that Congress did not intend the TCPA to abrogate statutes implementing the state's police power to protect its citizens' privacy and peaceful enjoyment of their homes, and FreeEats, as the party claiming preemption, bears the burden of proving it was the clear and manifest intent of Congress to supersede state law. See Bates, 125 S.Ct. at 1801; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Billey, 1998 ND 120, ¶28, 579 N.W.2d 171; State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307, 310 (N.D. 1988). The "ultimate touchstone" of preemption analysis is Congressional intent. Cipollone, 505 U.S. at 516 (quoting Malone v. White Motor Corn., 435 U.S. 497, 504 (1978)). When Congress has expressly addressed preemption in the federal statute, the question whether the federal law preempts state law necessarily is largely a matter of statutory construction. Home of Economy, 2005 ND 74, ¶6, 694 N.W.2d 840; Billey, at ¶28; Liberty, at 310 (quoting L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). In such cases, the plain wording of the statute "necessarily contains the best evidence of Congress' pre-emptive intent." Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002) (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

C

[¶23] As previously noted, there are three forms of federal preemption: express preemption, field preemption, and conflict preemption. Express preemption arises when Congress has explicitly defined the extent to which its enactment preempts state law. English, 496 U.S. at 78; Home of Economy, 2005 ND 74, ¶5, 694 N.W.2d 840.

There is no provision in the TCPA which explicitly states that the federal statute was intended to preempt state laws prohibiting certain classes of interstate calls. Rather, the federal act includes a provision explicitly stating that such state laws are not preempted by the TCPA. See 47 U.S.C. § 227(e)(1). There is no express preemption in this case.

D

[¶24] FreeEats contends that the pervasive and comprehensive scope of the TCPA evidences Congressional intent to fully occupy the field and preempt any and all state laws attempting to regulate or prohibit interstate telemarketing calls.

[¶25] Field preemption occurs when Congress intends federal law to occupy the entire field covered by the federal statute, to the exclusion of state regulation of the same subject matter. English, 496 U.S. at 79; Home of Economy, 2005 ND 74, ¶5, 694 N.W.2d 840. Such an intent may be inferred when the scheme of federal regulation is so pervasive as to create an inference that Congress left no room for the states to supplement it, or when the federal interest in the field is so dominant that it will be assumed to preclude enforcement of state laws on the same subject. English, at 79; Home of Economy, at ¶5. Where the field to be preempted encompasses areas that have been traditionally occupied by the states through their police power, congressional intent to displace state law must be "clear and manifest." English, at 79 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Home of Economy, at ¶5; see also Ours Garage, 536 U.S. at 432.

[¶26] In Flagship Capital, 2005 UT 76, ¶18, 125 P.3d 894, the court expressly rejected the notion that the federal

interest in regulating interstate telemarketing is so dominant that it supersedes all state laws touching the issue:

> While it is unquestioned that telemarketing is national, in fact global, in its scope, this confluence of commerce and technology, despite its power to inspire widespread annoyance and worse, throughout our nation, has not necessarily thereby created an exclusive federal interest. The Supreme Court has stated that "every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." Hillsborough County v. Automated Labs. Inc., 471 U.S. 707, 716, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). An apt analogy is the regulation of interstate highways. There, the interstate nature of the field is so undisputable that the subject has the word "interstate" in its name. However, this does not mean that federal interests dominate in the regulation of this interstate system. Instead, most of the regulation of the highways is left to the individual states to regulate through their police power to protect their citizens' health, welfare, and safety. Interstate telemarketing fits a similar niche. Like interstate highways, there is a federal interest, as illustrated by the TCPA, to define the basic parameters within which interstate telemarketing may occur. Within those walls, however, the states are left with discretion to determine whether the welfare of their citizens requires greater protection and to act on that determination.

[¶27] Similarly, the United States Supreme Court in Hillsborough, 471 U.S. at 717, concluded that the comprehensive nature of federal law on a subject does not necessarily mean states are barred from imposing additional requirements:

> In New York Dept. of Social Services v. Dublino, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973), the Court stated that "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." Id., at 415, 93 S.Ct., at 2514. There, in upholding state work-incentive provisions against a pre-emption challenge, the Court noted that the federal provisions "had to be sufficiently comprehensive to authorize and govern programs in States which had no . .. requirements of their own as well as cooperatively in States with such requirements." Ibid. But merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.

[¶28] The inclusion in a federal act of a specific, limited preemption provision is a clear expression of Congressional intent that federal law was not meant to wholly preempt state law in this field. Billey, 1998 ND 120, ¶31, 579 N.W.2d 171. The United States Supreme Court recognized in Cipollone, 505 U.S. at 517:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S., at 505, 98 S.Ct., at 1190, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282, 107 S.Ct. 683, 690,93 L.Ed.2d 613 (1987) (opinion of Marshall, J.).

[¶29] The United States Court of Appeals for the Eighth Circuit has expressly held that there was no intent by Congress to create field preemption under the TCPA:

> The TCPA carries no implication that Congress intended to preempt state law; the statute includes a preemption provision expressly not preempting certain state laws. If Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision. Further, the preemption provision makes it clear that Congress did not intend to "occupy the field" of ADAD regulation, see Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulation of intrastate ADAD calls that differs from federal regulation.

Van Bergen, 59 F.3d at 1548.

[¶30] The TCPA includes explicit provisions stating the TCPA was not intended to preclude enforcement of all state laws within its subject matter. See 47 U.S.C. § 227(e)(1). In fact, 47 U.S.C. § 227(e)(1) is expressly titled "State law not preempted." See Chair King Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707, 718 (Tex. 2006). The TCPA also contains a provision reserving the right of state officials to bring actions in state courts "on the basis of an alleged violation of any general civil or criminal statute of such State." 47 U.S.C. § 227(f)(6). The statutory language of the TCPA clearly expresses the intent of Congress that the TCPA was not meant to wholly occupy the field within its subject matter, and was not intended to preempt all state law affecting the same subject. We conclude there is no field preemption in this case.

E

[¶31] The final prong of preemption analysis is conflict preemption. Conflict preemption may be found to exist "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" English, 496 U.S. at 79 (citation omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); Home of Economy, 2005 ND 74, ¶5, 694 NM.2d 840 (quoting English).

[¶32] FreeEats has failed to meet its burden of demonstrating that application of N.D.C.C. § 51-28-02 to interstate political polling calls would make it impossible for a private party to comply with both federal and state law. In analyzing such "actual conflict" preemption, the United States Supreme Court has used the example of a state law that would "premis[e] liability upon the presence of the very windshield retention requirements that federal law requires." Geier v. American Honda Motor

Co., 529 U.S. 861, 871-72 (2000). There has been no showing that a telemarketer's compliance with the prohibitions in N.D.C.C. § 51-28-02 would place it in direct noncompliance with the TCPA. In the context of this case, FreeEats would not have violated any provision in the TCPA if it had complied with North Dakota law and refrained from placing calls to North Dakota residents.

[¶33] FreeEats argues that there is an actual conflict between federal and state law because "FreeEats can conform to both sets of requirements only by forsaking the federally recognized right to use prerecorded messages when making interstate polling calls to residents of North Dakota." In addition to being premised upon a misreading of the clear and unambiguous language of the TCPA's savings clause, FreeEats' contention ignores the "interstitial nature" of federal law. See Billey, 1998 ND 120, ¶28, 579 N.W.2d 171. States are generally free to complement federal law by identifying additional local needs and imposing further regulations. See Hillsborough, 471 U.S. at 717. A federal statutory prohibition of certain conduct does not automatically create an overarching right to engage in all conduct not expressly prohibited by the statute.

[¶34] Addressing whether the TCPA preempts application of state telemarketing laws to interstate telemarketing calls, the Supreme Court of Utah reasoned:

> Close examination of the Utah laws shows that they are not in conflict with the TCPA, nor do they stand as an obstacle to the accomplishment and full objective of federal law. We see no reason why telemarketing companies would be unable to comply with both the Utah laws and the

> federal statutes. This intention of the Utah legislature is made clear by Utah Code section 13-25a-103(4), which reads: "A person may not make or authorize a telephone solicitation in violation of Title 47 U.S.C. 227." The telemarketing standards set by our legislature are stricter than, but do not directly conflict with, the federal standards. A telemarketer who complies with the Utah standards will have little difficulty complying with the federal standards. Moreover, the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents. Therefore, the Utah law does not force a telemarketer to conform its nationwide practices with Utah standards in order to prevent an inadvertent violation. The telemarketer can simply identify those calls that would be made to Utah and choose to not make those calls or to conform those calls to the Utah regulations. That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

Flagship Capital, 2005 UT 76, ¶22, 125 P.3d 894 (footnote omitted); see also Chair King, 184 S.W.3d at 718 ("Congress clearly did not intend the TCPA to establish a ceiling if states decided to be more aggressive in their approach").

[¶35] Similarly, we conclude FreeEats has failed to demonstrate that application of N.D.C.C. § 51-28-02 to inter-

state political polling calls would stand as an obstacle to the accomplishment of the full purposes of Congress in enacting the TCPA. When Congress has addressed preemption in the federal statute, preemption is necessarily a question of statutory construction, Home of Economy, 2005 ND 74, ¶6, 694 NW.2d 840, and where Congress has expressed its intent in reasonably plain terms the language of the statute is ordinarily regarded as conclusive. Negonsott v. Samuels, 507 U.S. 99, 104 (1993). Here, the plain language of 47 U.S.C. § 227(e)(1) demonstrates that it was not within the full purposes of the TCPA to prevent states from prohibiting certain interstate telemarketing calls.

[¶36] FreeEats argues that the United States Supreme Court's decisions in Geier, 529 U.S. 861 (2000) and United States v. Locke, 529 U.S. 89 (2000), make it clear that statutory savings clauses do not insulate state enactments from preemption analysis. See also Sprietsma, 537 U.S. at 65. The Court in those cases recognized that inclusion of a savings clause in a federal statute does not bar the ordinary working of conflict preemption principles. See Sprietsma, at 65; Geier, at 869. The Court did not, however, hold that the language Congress employed in a savings clause is wholly immaterial to preemption analysis. The Court merely rejected the notion that inclusion of a savings clause created a "special burden" beyond that inherent in ordinary preemption principles, and concluded state law may be found preempted by federal law if there is an actual conflict with the federal objective. See Geier, at 87072.

[¶37] We do not read those cases as holding that a court may not consider the precise language of a savings clause when discerning the intent of Congress and the purpose

of the federal act when determining whether conflict preemption is present. In each of those cases, the Court was required to determine whether conflict preemption existed when there were inconsistent and conflicting preemption provisions and savings clauses within the federal statutes. They did not involve, as this case, an express provision explicitly providing that nothing in the federal statute "shall preempt any State law" on the precise subject matter involved in the case.

[¶38] We have analyzed the preemption question under ordinary conflict preemption principles. In doing so, we have attempted to discern the intent of Congress and to give effect to the purposes underlying the TCPA. We have found Congressional intent and the resulting purpose of the statute in the clear and unambiguous language of the statute. Where Congress has included an express provision granting states the power to enact laws prohibiting the use of automatic telephone dialing systems or artificial or prerecorded voice messages in interstate telemarketing calls, it cannot frustrate the intent of Congress when the state acts within the terms of that grant.

[¶39] In defining express preemption, the United States Supreme Court has held that "[p]re-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." English, 496 U.S. at 78-79 (citation omitted). Although this rule is ordinarily applied in situations where Congress has expressly declared that certain state laws are preempted, we see no reason why it does not apply with equal force when Congress clearly and unambiguously states that certain state laws are not preempted by the federal act. In either case, the intent of Congress is clear from the

statutory language, and the court's "easy" and solitary task is to enforce the statute according to its terms. We conclude Congress has clearly and unambiguously expressed its intent that the TCPA does not preempt application of a state statute prohibiting interstate telemarketing calls which use automatic dialing equipment or artificial or prerecorded voice messages.

[¶40] Our holding is in accord with the only other appellate decision expressly addressing this issue to date. See Flagship Capital, 2005 UT 76, 125 P.3d 894. FreeEats has drawn our attention to a recent federal trial court decision holding, in the context of interstate facsimile advertisements, that the TCPA's savings clause did not preclude preemption of California's attempt to regulate interstate fax advertising. Chamber of Commerce v. Lockyer 462482 (E.D Cal. Feb. 27, 2006). The court's decision in Lockyer was premised upon its conclusion that the presumption against preemption does not apply and upon a strained reading of the language of 47 U.S.C. § 227(e)(1). We decline to follow Lockyer.

IV

[¶41] We have considered the remaining issues and arguments raised by the parties and they are either unnecessary to our decision or are without merit. We affirm the judgment.

[¶42] Carol Ronning Kapsner
Mary Muehlen Maring
Daniel J. Crothers
William F. Hodny, S.J.
Gerald W. VandeWalle, C.J.

[¶43] The Honorable William F. Hodny, S.J., sitting in place of Sandstrom, J., disqualified.

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH Case No. 04-C-1694

State of North Dakota ex rel. Wayne Stenehjem, Attorney General,

Plaintiff,

Opinion and Order

vs.

FreeEats.com, Inc. dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.Info, ElectionResearch.com FECads.com, and FECResearch.com,

Defendant.

Both the State of North Dakota (the State) and FreeEats.com (FreeEats) have requested the Court grant summary judgment in this matter. In order to decide the matter the Court must determine whether the federal Telephone Consumer Protection Act preempts Section 51-28-02 of the North Dakota Century Code and whether that section passes constitutional muster.

As explained in this opinion, the statute is not pre-empted, and because the statute is a content-neutral

time, place, or manner restriction on speech and it does not violate constitutional free speech protection.

FACTS

This action was commenced by the North Dakota Attorney General's office, Consumer Protection & Antitrust Division. The complaint alleges FreeEats violated North Dakota law by contacting, or attempting to contact, residents of North Dakota by telephone using an automatic dialing-announcing device (ADAD) containing a prerecorded polling voice message. *Compl.*, ¶ 8. The telephone messages were wholly automated, no live human being was on the calling end of the telephone. *Id.*, ¶ 10. It is alleged the North Dakota telephone subscribers did not knowingly request, consent to, or authorize the automated message from FreeEats. *Id.*, ¶ 11.

The complaint asserts the messages were not from "school districts to students, parents, or employees, messages to subscribers with whom FreeEats had a current business relationship, or messages advising employees of work schedules." *Id.*, ¶ 13. For the alleged violations, the State requested injunctive relief, civil penalties, and attorney fees and costs pursuant to North Dakota law. *Id.*, ¶ 14. FreeEats does not dispute this, admitting the calls were noncommercial political polling calls automatically placed by FreeEats in Virginia. *See Aff.* Gabriel Joseph, III, November 11, 2004.

Both parties filed motions for summary judgment. FreeEats claims, because (1) the calls were placed outside of North Dakota and (2) were noncommercial in nature, North Dakota is preempted by the federal Telephone Consumer Protection Act (TCPA). FreeEats also argues

the statute violates the First Amendment's free speech guarantees.

The State asserts the North Dakota law prohibiting most pre-recorded phone messages is not preempted by federal law and is not unconstitutional. The State also claims liability should be rendered against FreeEats as a matter of law because FreeEats has already admitted it made ADAD telephone calls in violation of North Dakota law.

LAW AND ANALYSIS

In their briefs, the parties address two main issues: Preemption and constitutional concerns. The presumption against federal preemption is strong, unless Congress clearly intended to do so. ***Gregory v. Ashcroft***, 501 U.S. 452, 461 (1991). In the same light, finding a North Dakota statute unconstitutional is difficult. In order for a statute to be held unconstitutional under the State Constitution, four of the five justices of the North Dakota Supreme Court must agree.

Federal Preemption

As stated, the presumption against federal preemption is strong. States have historically regulated against unfair business practices. ***Cedar Rapids Cellular Tel., L.P. v. Miller***, 280 F.3d 874, 879-80 (8th Cir. 2002). Consumer protection laws enjoy a stronger presumption against preemption. ***Black v. Financial Freedom Senior Funding Corp.***, 92 Cal. App. 4th 917, 926 (Cal. App. 2001) (holding "unfair business practices are included within the states' police power, and are thus subject to this heightened presumption against preemption"). Even the FCC has stated "states have a long history of regulat-

ing telemarketing practices." ***Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992***, 68 Fed. Reg. 44154, ¶ 53.

The Eighth Circuit Court of Appeals has addressed the very issues presented here. ***Van Bergen v. Minnesota***, 59 F.3d 1541 (8th Cir. 1995). In ***Van Bergen*** the Eighth Circuit held the Minnesota ADAD statute was not preempted by the TCPA. The Minnesota statute read, as it does today:

> A caller shall not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 325E.30 do not apply to (1) messages from school districts to students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) message advising employees of work schedules.

Minn. Stat. § 325E.27 (1995); ***Van Bergen***, 59 F.3d at 1546. Section 51-28-02 of the North Dakota Century Code states, in virtually identical language to § 325E.27:

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the sub-

> scriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.[1]

The same analysis used to find Minnesota's ADAD statute valid should be used here.

Van Bergen involved political ADAD telephone calls. Van Bergen, a candidate for governor of Minnesota, planned to use inexpensive ADAD calls to reach potential voters. ***Van Bergen*** 59 F.3d at 1546. The Minnesota Attorney General's office, however, informed Van Bergen the ADAD statute would apply to the noncommercial political type calls he was planning on placing. ***Id***. Van Bergen then applied for, and was denied, a temporary restraining order against the enforcement of the statute. He appealed the decision.

The Eighth Circuit analyzed whether the statute was preempted by the Federal TCPA. The Court cited the savings clause of the TCPA, stating state laws are not preempted if the State "imposes more restrictive intrastate requirements or regulations on, or which prohibits-- . . . (B) the use of automatic telephone dialing systems . . .

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[1] In addition to Minnesota and North Dakota, at least four other states currently have similar provisions in their statutes prohibiting noncommercial interstate ADAD calling. Burns Ind. Code Ann. § 24-5-14-1 to 5 (2004); R.I. Gen. Laws § 5-61-3.4 (2004j); S.C. Code Ann. § 16-17-446 (2003); Tenn. Code Ann. § 47-18-1502 (2004).

." ***Van Bergen***, 59 F.3d at 1547 (quoting 47 U.S.C. § 227(e)(1)). There was no express preemption of the Minnesota statute found in the TCPA by ***Van Bergen***. ***Id***. at 1547-48. The TCPA simply does not state more restrictive state laws are preempted, only that more restrictive intrastate requirements are not preempted. If Congress wanted to expressly preempt state ADAD laws it would have done so explicitly.

The TCPA did not preempt the Minnesota statute by implication. ***Van Bergen***, 59 F.3d at 1548. While it is possible for federal law to preempt state law by implication, the TCPA was found not to carry such an implication. ***Id.*** The Court stated: "If Congress intended to preempt other state laws, that intent could easily have been expressed as part of [the savings clause]." ***Id***. The Court held Congress did not intend to "'occupy the field' of ADAD regulation . . . or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulations of intrastate ADAD that differs from federal regulation." ***Id.*** The Minnesota statute was not preempted for this reason, nor should the nearly identical North Dakota statute be preempted.

The Minnesota statute did not conflict with the TCPA. ***Van Bergen***, 59 F.3d at 1548. Only two differences were found between the TCPA and the "virtually identical" Minnesota statutes: 1) the TCPA exempts only emergency calls, and the Minnesota statute exempts callers with prior personal or business relationship from restrictions on ADAD calls; 2) the TCPA only applies to residences and specified businesses, such as hospitals, and the Minnesota statute applies to both residences and businesses. ***Id.*** at 1548. Recognizing the variations, the Court cited to a provision in the TCPA where Congress

authorized the FCC to consider: "the inclusion of businesses in the locations to which ADAD calls are limited; and the exemption of calls that do not adversely affect privacy rights, among which may be calls from those with whom a prior business or personal relationship exists." **Id.** The Court found "it was clear that the Minnesota statute and the TCPA [were] designed to promote an identical objective, and that there [was] nothing in the two statutes that create[d] a situation in which an individual [could not] comply with one statute without violating the other." ***Id.*** The same is true for the North Dakota statute.

FreeEats argues ***Van Bergen*** interpreted only the *intrastate* implications of the Minnesota ADAD statute, not the *interstate* implications. The alleged fact was not explicitly stated, or even implied, in ***Van Bergen***. Van Bergen did not even place any calls, he sought an injunction before placing them. The State's explanation of this omission here is persuasive; why would the Eighth Circuit even need to address federal preemption if the calls had been made intrastate? The savings clause would then *clearly* allow for state regulations of intrastate ADAD calls, making the need to address preemption a waste of the Court's time.

First Amendment

FreeEats argues Section 51-28-02 violates its right to freedom of speech guaranteed by the First Amendment. ***Van Bergen*** held Minnesota's ADAD statute constitutional. As both state's ADAD provisions are nearly identical, the same rationale in ***Van Bergen*** should be applied here to find the statute constitutional.

The statute is content-neutral, despite FreeEats' assertion it is not. FreeEats asserts the exceptions to the ADAD statute allowing schools, employers, and those with current business relationships to use ADAD technology to contact those subscribers is "content based" and "speaker based." This rationale is incorrect. Government is permitted to place "reasonable restrictions on the time, place or manner of engaging in protected speech" as long as the regulations are "without reference to the content of the regulated speech." ***Van Bergen***, 59 F.3d at 1550 (quoting ***Ward v. Rock Against Racism***, 497 U.S. 781, 791 (1989)).

The relationship between the caller and subscriber is determinative, not content. "Caller" was defined by Minnesota statute as "a person, corporation, . . . or commercial entity who attempts to contact, or who contacts, a subscriber in this state by using a telephone or a telephone line." Minn. Stat. § 325E.26 subd. 3. North Dakota defines a "caller" using virtually identical language. *(Section 51-28-01(2))*. In Minnesota "message" is defined "as including any call, regardless or its content." M.S.A. § 325E.26 subd. 6. North Dakota uses virtually identical language. *(Section 51-28-01(5))*.

The basis for the restrictions, both in Minnesota and North Dakota, is not on the basis of the content of their messages, rather it is on the basis of their relationship with the subscriber. ***Van Bergen***, 59 F.3d at 1550. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." ***Id***. (quoting ***Clark v. Community for Creative Non-Violence***, 468 U.S. 288, 293 (1984)). In addition, these exceptions all rest on the single premise that the caller has a current relationship with the subscriber, implying

the subscriber's consent to receive ADAD calls. ***Id.*** Section 51-28-01 is content-neutral.

Van Bergen also addressed whether the content-neutral time, place, or manner restriction on the statute was "narrowly tailored to serve a significant government interest." The Court concluded it was narrowly tailored and provided adequate alternatives to communication. ***Van Bergen***, 59 F.3d at 1553-54. It declared residential privacy was a significant government interest. "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." ***Id.*** at 1554 (citation omitted). The Court concluded: "Moreover, we do not believe that external evidence of the disruption ADAD calls can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities." ***Id.***

ADAD calls intrude on the privacy and peacefulness of the home and the efficiency of the workplace. ***Id.*** at 1555. They do not provide the telephone subscriber the ability not to receive such calls. ***Van Bergen*** held "the government has a substantial interest in limiting the use of unsolicited, unconsented-to ADAD calls." ***Id.***

Van Bergen next concluded the substantial interest the government had in restricting ADAD calls was narrowly tailored and provided ample alternative channels for communication (e.g. a live operator can call the subscriber). ***Id.*** at 1555-56. The statute did not foreclose an entire medium or communication. ***Id.*** at 1555. The limits on ADAD calls were deemed to be designed to fix perceived problems with the liberal use of the technology. "ADADs are a new technology, and people have been

campaigning for elective office, soliciting for charities, spreading religious messages, and selling products for centuries without the benefit of these machines." ***Id.*** at 1556.

The North Dakota ADAD statute is narrowly tailored to the governmental interests of protecting the privacy and tranquility of the private home and efficient work-place. The ability to place a telemarketing phone call to a resident of North Dakota is not foreclosed by the ADAD statute.

Conclusion

The State's motion for summary judgment is **granted**. FreeEats' motion for summary judgment is **denied**.

Dated: February 2, 2005.

BY THE COURT:

s/Gail Hagerty
Gail Hagerty
District Judge

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH **Case No. 04-C-1694**

State of North Dakota ex rel. Wayne Stenehjem, Attorney General,

Plaintiff,

vs.

FreeEats.com, Inc. dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.Info, ElectionResearch.com FECads.com, and FECResearch.com,

Defendant.

Affidavit of Mailing

04-C-1694

I, Ronda Colby, being duly sworn, depose and say that I am a United States citizen over 21 years of age, and on the 2nd day of February, 2005, I deposited in a sealed envelope true copies of the attached:

OPINION AND ORDER

in the United States mail at Bismarck, North Dakota, postage prepaid and addressed to:

Lawrence King, P.O. Box 1695, Bismarck, ND 58502
Emilio Cividanes, 1200 19th St NW, Washington, DC 20036-2430
James Thomas, P.O. Box 1054, Bismarck, ND 58502.

Dated this 2nd of February, 2005.

s/Ronda Colby
Ronda Colby

Subscribed and sworn to before me this 2 day of February, 2005.

s/[Illegible]
Notary Public
Burleigh County,
North Dakota
My Commission Expires:
4/12/08

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. art VI, cl. 2.

This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Telephone Consumer Protection Act of 1991

47 U.S.C. § 227

* * *

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

* * *

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

* * *

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In

implementing the requirements of this subsection, the Commission—

* * *

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose;

* * *

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(B) the use of artificial or prerecorded voice messages;

* * *

North Dakota Century Code § 5-28-02

Use of prerecorded or synthesized voice messages. A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.